
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CLINTON STRANGE,

Plaintiff,

v.

T C N, INCORPORATED; CELTIC
BANK CORPORATION;
CONTINENTAL FINANCE COMPANY,
LLC; and EASTPOINT RECOVERY
GROUP, LLC,

Defendants.

**MEMORANDUM DECISION
AND ORDER DISMISSING WITH
PREJUDICE ALL CLAIMS AGAINST
T C N INCORPORATED**

Case No. 4:18-cv-00058-DN

District Judge David Nuffer

Defendant T C N Incorporated (“TCN”) filed a motion (“Motion”)¹ to dismiss Plaintiff Clinton Strange’s First Amended Complaint² under [Fed. R. Civ. P. 12\(b\)\(6\)](#) for failure to state a claim on which relief can be granted. Because the Motion presents matters outside the pleadings, which are not excluded, it is treated as a motion for summary judgment under [Fed. R. Civ. P. 56](#).³ Strange has failed to file a response to the Motion, and the time to do so has expired.⁴

Because there is no genuine dispute as to any material fact and TCN is entitled to judgment as a matter of law, the Motion is GRANTED.

¹ Motion to Dismiss Plaintiff’s First Amended Complaint and Memorandum in Support (“Motion”), [docket no. 10](#), filed December 11, 2018.

² [Docket No. 9](#), filed November 30, 2018.

³ See [FED. R. CIV. P. 12\(d\)](#).

⁴ See Request to Submit for Decision, [docket no. 13](#), filed January 22, 2019.

UNDISPUTED MATERIAL FACTS

Based on the record and evidence presented, there is no genuine dispute as to any of the following material facts.

Patricia A. Hill, who is not a party to this case, obtained a credit card from Defendant Celtic Bank Corporation (“Celtic”).⁵ At that time, she entered into an agreement with Celtic and its agent, Defendant Continental Finance Company LLC (“Continental”), governing use of the card.⁶ In that agreement, Hill expressly consented and authorized Celtic and Continental to contact her by telephone.⁷

Thereafter, Hill defaulted on the debt she incurred.⁸ Celtic and Continental “consigned” her debt to Defendant Eastpoint Recovery Group LLC (“Eastpoint”) for collection.⁹ In an attempt to collect the debt, Eastpoint tried calling Hill on the telephone.¹⁰ Four of these calls were accidentally placed to Strange’s cellphone number because it was in Hill’s contact information from Celtic and Continental.¹¹ Two of these four calls were automatic “robocalls,” which Eastpoint generated on May 30 and June 5, 2018, through software that TCN created.¹²

⁵ First Amended Complaint, *supra* note 5, ¶¶ 1-2, at 5-6.

⁶ *Id.* ¶¶ 9, 31, at 7, 15.

⁷ *Id.* at 7; *see* Exhibit B, at 8, [docket no. 9-2](#), filed November 30, 2018.

⁸ First Amended Complaint, *supra* note 5, ¶ 3, at 6.

⁹ *Id.* ¶ 5.

¹⁰ *Id.* ¶ 6.

¹¹ *Id.* ¶ 7; Affidavit in Support of Motion for Dismissal of Petition or Continuance of Trial ¶¶ 5-6, at 2 (“Green Affidavit”), [docket no. 10-2](#), filed December 11, 2018.

¹² First Amended Complaint, *supra* note 5, ¶¶ 7, 18, 24, at 6, 11, 13; *see* Exhibit F, [docket no. 9-6](#), filed November 30, 2018.

Eastpoint's use of TCN's software was entirely self-directed.¹³ TCN played no role in how or when Eastpoint used the software or regarding whom Eastpoint contacted with it.¹⁴

Both of the robocalls that Strange received from Eastpoint lasted 51 seconds and stated:

Hi. Hi, this is an important message for Patricia A. [Hill]. If this is not Patricia A. [Hill], then please hang up now. By remaining on this call you have acknowledged that you are in fact Patricia A. [Hill]. We are calling from East Point Recovery Group. This call is an attempt to collect a debt, and any information obtained will be used for that purpose. Patricia A. [Hill], please call me back at 1-8-0-0-4-5-9-2-4-1-7, with your reference number 4-6-4-2-0-2.¹⁵

Strange does not know Hill.¹⁶ He has never authorized Celtic, Continental, Eastpoint, or TCN to contact him.¹⁷ He does not owe any debt to Celtic, Continental, Eastpoint, or TCN.¹⁸ And he “does not like to receive automated debt collection calls that do not pertain to him.”¹⁹ “These calls deplete [the] battery on his cellphone”; “cause his phone to display a voice mail message in the call log”; “deplete [the] memory storage capacity on his cellphone”; “take up space in his voicemailbox”; and require him to “utilize a measurable amount of his Physical and Mental Energy to ‘unlock’ his phone, and review and delete the contents of the unwanted Debt Collection Voicemails.”²⁰

¹³ Declaration of Jesse Bird ¶¶ 4-6, [docket no. 10-4](#), filed December 11, 2018.

¹⁴ *Id.*

¹⁵ First Amended Complaint, *supra* note 5, ¶ 18, at 11; Exhibit E, at 3, [docket no. 9-5](#), filed November 30, 2018.

¹⁶ First Amended Complaint, *supra* note 5, ¶¶ 1, 28, at 5, 14.

¹⁷ *Id.* ¶ 22, at 13.

¹⁸ *Id.* ¶ 23.

¹⁹ *Id.* ¶ 26.

²⁰ *Id.*

On June 6, 2018, Strange, for the first time, asked Eastpoint to stop calling him.²¹ Upon receiving this request, Eastpoint immediately removed Strange's number from its system and never called him again.²² All of the calls to Strange had been entirely accidental and unintentional.²³ At the time they were made, Strange's number did not appear in the national do-not-call registry.²⁴

DISCUSSION

Summary judgment is appropriate if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”²⁵ A dispute is “genuine” if “there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way.”²⁶ A fact is “material” if “it is essential to the proper disposition of [a] claim.”²⁷ In ruling on a motion for summary judgment, the evidence and all reasonable inferences are viewed in the light most favorable to the nonmoving party.²⁸

In this action, Strange asserts claims against TCN for violation of the Fair Debt Collection Practices Act (“FDCPA”)²⁹ and Telephone Consumer Protection Act (“TCPA”).³⁰ Both claims fail as a matter of law.

²¹ Exhibit D, [docket no. 9-4](#), filed November 30, 2018.

²² Green Affidavit, *supra* note 11, ¶ 9, at 2.

²³ *Id.* ¶¶ 5-6.

²⁴ *Id.* ¶ 7.

²⁵ FED. R. CIV. P. 56(a).

²⁶ *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998).

²⁷ *Id.*

²⁸ *Id.*

²⁹ First Amended Complaint, *supra* note 5, at 10, 18.

³⁰ *Id.* at 9, 17-18; *see* [47 U.S.C. § 227](#).

Strange's FDCPA claim fails as a matter of law.

The FDCPA's purpose is "to eliminate abusive debt collection practices by debt collectors."³¹ Among other things, it prohibits "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number."³² A debt collector who fails to comply with the FDCPA may be liable "to any person" for "actual damage sustained by such person as a result of such failure," plus "additional damages . . . not exceeding \$1,000" "in the case of any action by an individual."³³ "In determining the amount of liability in . . . any individual action," courts must consider "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional."³⁴ "A debt collector may not be held liable in any action brought under [the FDCPA] if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."³⁵ Liability under the FDCPA is a legal issue.³⁶

It is undisputed that all of the calls Strange received from Eastpoint were entirely accidental and unintentional.³⁷ When Eastpoint became aware of its error, it stopped calling

³¹ 15 U.S.C. § 1692(e).

³² *Id.* § 1692(d)(5).

³³ *Id.* § 1692k(a).

³⁴ *Id.* § 1692k(b)(1).

³⁵ *Id.* § 1692k(c).

³⁶ See *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1027 (9th Cir. 2012); *Kalebaugh v. Berman & Rabin, P.A.*, 43 F. Supp. 3d 1215, 1223 (D. Kan. 2014).

³⁷ See *supra* notes 23-24 and accompanying text.

Strange.³⁸ Because the calls that were placed to Strange's cellphone number were not made with intent to annoy, abuse, or harass anyone at that number, his FDCPA claim fails as a matter of law.

Strange's TCPA claim fails as a matter of law.

The TCPA prohibits "mak[ing] any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service."³⁹ It is undisputed, however, that TCN did not *make* any call to Strange. Eastpoint did. Although Eastpoint placed two calls to Strange using TCN's software, Eastpoint's use of TCN's software was entirely self-directed and independent of TCN's involvement.⁴⁰ Accordingly, Strange's TCPA claim against Strange fails as a matter of law.

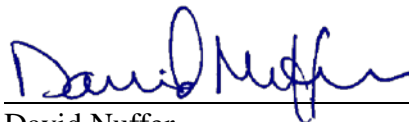
ORDER

THEREFORE, IT IS HEREBY ORDERED that the Motion⁴¹ is GRANTED, except to the extent it requests an award of attorney's fees and costs under [15 U.S.C. § 1692k\(a\)\(3\)](#), which request is DENIED without prejudice.

IT IS FURTHER HEREBY ORDERED that all of Strange's claims against TCN are DISMISSED with prejudice.

Signed March 27, 2019.

BY THE COURT:

A handwritten signature in blue ink, appearing to read "David Nuffer", is written over a horizontal line.

David Nuffer
United States District Judge

³⁸ See *supra* notes 21-22 and accompanying text.

³⁹ [47 U.S.C. § 227\(b\)\(1\)\(A\)\(iii\)](#).

⁴⁰ See *supra* notes 12-14 and accompanying text.

⁴¹ [Docket no. 10](#), filed December 11, 2018.